IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1259

BEN R. HENDRIX TRADING CO., INC.,
Petitioner,

versus

J. HENRY SCHROEDER BANKING CORPORATION, CLAUDIO CASTANEDA, SHERIFF OF HIDALGO COUNTY, TEXAS, W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY OF THE UNITED STATES, ALAMO EXPRESS, INC., KEN KELLAR, d/b/a EXPORTS, INC. AND JUD BRADY, d/b/a BRADY'S,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case.

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1 Petitioner was a plaintiff-defendant in trial court and plaintiff-appellant-cross-appellee in the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, dated October 11, 1977, (3a-9a), reported at 560 F. 2d 1192, the judgment (1a-2a), entered on October 11, 1977, and the Order of the Fifth Circuit, denying Petition for Rehearing, dated December 13, 1977, (9a-10a), here sought to be reviewed, are reproduced in the Appendix.

The opinion of the District Court may be found at 373 F. Supp. 1283.

JURISDICTION

Under 28 USC §1254(1) civil cases in the United States Court of Appeals may be reviewed in this Court by writ of certiorari upon the petition of any party.

Certiorari is requested on the following bases found in Rule 19(b) of this Court:

1. It is an important question of federal law, which has not been, but should be settled by this court.

2. It has sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Certiorari is requested additionally since the lower court has in effect ignored the rulings of this Court, and destroyed a Treaty of the United States.

The Fifth Circuit's opinion and judgment, which Petitioner asks be reviewed, were entered October 11, 1977, and the timely application for rehearing en banc was denied by the Fifth Circuit on December 13, 1977.

According to 28 USC §1201(c) and *Bowman v. Loperena Marina* (1940) 311 U.S. 262, 266 the 90 day period would commence on December 14, 1977 and the last day for filing would be March 13, 1978.

According this Court's jurisdiction is invoked under 28 USC §1254(1) and Supreme Court Rule 19(b).

QUESTION PRESENTED

Can a request for a Declaratory Judgment concerning a jurisdiction of a State court over chattels "in transit" in international commerce be moot because the company whose goods were seized by state officers, sought protection under Chapter XI of the Bankruptcy Act, which Bankruptcy court subsequently during the appeal sold the goods in question to prevent further loss and storage costs.

CONSTITUTIONAL PROVISIONS, TREATIES STATUTES, ORDINANCES OR REGULATIONS CONCERNED

Relevant international law is the General Agreement on Tariffs and Trade (GATT), 61 Stat pts 5 & 6 at A3, TIAS 1700, 4 Bevans 639, 55-61 UNTS., and "The right of way or passage."

Relevant federal law is GATT; the Constitution of the United States, Article I, Section 8, Clause 3 (the Commerce Clause);

> Article 6 Cl. 2 (Supremacy Clause) United States Constitution (b); "all treaties made under the authority of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding".
>
> Constitution of the United States Sect. 8. POWERS GRANTED TO CONGRESS (j) "to define and punish piracies and felonies committed on the high seas and offenses against the laws of nations".
>
> Piracy was illegal stealing at sea or on land after a descent from the sea.

the Tariff Act of 1930; 19 C.F.R 19.6c; 19 Op. Atty. Gen. 101, as well as the 14th Amendment to the Constitution.

Relevant Texas law is the former Tex. Civ. St. Art. 6840 and the former Texas Rules of Civil Procedure, rules 696-716

STATEMENT OF THE CASE

This case was the consolidation of two cases brought in the United States District Court for the

Southern District of Texas, at Brownsville, Reynaldo G. Garza, J., 373 F. Supp. 1283. The actions were filed by J. Henry Schroeder Banking Corp. (hereinafter referred to as Schroeder) and Ben R. Hendrix Trading Co., Inc. (hereinafter referred to as Hendrix) seeking declaratory relief concerning the attempted seizure by Schroeder of certain bonded liquor of Hendrix consisting of 25 trailerloads (20,000 cases) which was destined for Mexico. Schroeder filed a petition for writ of sequestration in a Texas court claiming a security interest under the Uniform Commercial Code which has since been declared invalid. The clerk of court issued the writ under applicable Texas law which has since been declared unconstitutional. The Texas Sheriff attempted to take possession of the goods, but Customs who were in joint possession with Hendrix and others under federal law refused to heed the State court order, advising Schroeder and the Sheriff that such actions were in violation of federal law. During the power struggle Hendrix was dispossessed and was unable to operate. An employee of Hendrix attempted to negotiate a compromise without authority but this failed as well. Both parties sought relief in federal court, Schroeder to have the seizure declared valid and Hendrix to have the seizure and the jurisdiction of the state court declared invalid. After deciding that the only Supreme Court case on point was no longer valid, ignoring the Texas decision on point, GATT and federal law, the district court found that the state court could adjudicate ownership of the goods in question. Soon after Hendrix sought protection under Chapter XI of the bankruptcy act, as a debtor in possession. Then the appeal to the Fifth Circuit was filed. During the pendency of the appeal, the bankruptcy court over

the objection of Hendrix sold all the goods that had been seized by Schroeder. The question of mootness was raised in the appeal and contested by various memoranda, briefs, reply briefs and oral argument. After almost a year after oral argument the Fifth Circuit handed down its opinion. Almost at the same time, the Bankruptcy Court validated state court jurisdiction as the District Court had done, invalidated any secured claim of Schroeder under the originally claimed UCC security agreement on the grounds that the agreement had never been signed by Hendrix, but held that Schroeder was a secured creditor for having seized the goods through the state court. The Bankruptcy Court also held that all parties which held the goods in storage during the fight were secured creditors. An appeal to the District Court has been filed in the bankruptcy matter.

STATEMENT OF FACTS

Ben R. Hendrix Trading Co., Inc. is a Louisiana corporation which had its principal office in New Orleans and was qualified to do business in the State of Texas. Hendrix was in the business of international trade and had had a long business relationship with J. Henry Schroeder Banking Corporation, a New York Corporation not qualified to do business in Texas, which is wholly owned by a London based international banking firm which has been in business for generations.

In 1973 after some dispute arose about a loan, Schroeder Bank filed in Texas an unsigned UCC financing form which it alleged grew out of a Louisiana agreement. As any freshman law student knows, Louisiana does not recognize the UCC as valid, in fact many policies of the UCC are contra to the public policy of Louisiana which uses the Civil or Roman based law. This has been codified in its present form in Louisiana since 1825.

Schroeder secured a writ of sequestration based on the UCC claim from the Clerk of the District Court of Hidalgo County, being the 93rd Judicial District of the State of Texas, and an affidavit that Schroeder was authorized to do business in Texas.

Thereupon Mr. Castaneda, as the Sheriff of Hidalgo County tried to seize and take custody of the goods which were under custody of the U.S. Customs and which were being shipped from various ports in Europe to Mexico through the United States via the Foreign Trade Zone No. 2 in New Orleans, La. These in bond, intransit goods consisted mostly of various alcoholic beverages which because of various federal laws could not have been entered into the commerce of the United States even if Hendrix had so desired.

After attempts to sell the goods failed because of Customs resistance, the federal actions for declaratory relief were filed.

REASONS FOR GRANTING THE WRIT

Hendrix addresses several legal questions. First, it argues that the question is not moot, then it raises three legal propositions as to why the seizure by Schroeder was unconstitutional and in violation of international and federal law.

On The Question Of Mootness

Chief Judge Brown on page 170 of the opinion (6a-8a) speaks of "Mootness in the Moonshine." First, the matter is clearly not moot and second, the liquor involved included expensive spirits from Scotland and French champagne, wines and cognacs.

The Fifth Circuit would have us believe that the forced sale of approximately one million dollars worth of expensive spirits for about one half of the normal value in trade circles ended any case or controversy. These spirits were stored in part in sealed trailers in the hot south Texas sun, under which conditions, champagne and wine are quite perishable. This situation is analogous to that Admiralty Rule E (9)(b) contemplates, which rule permits the interlocutory sale of attached or arrested property if it is liable to perish, deteriorate or decay on account of the custody. The bankruptcy court ordered the goods sold, perhaps not in the best manner, but in the correct interest of preventing further loss.

The Fifth Circuit is not correct at page 170 (6a) when it states, "During the course of the Chapter XI proceedings, all parties moved to sell the liquor." Actually the largest creditor, First National Bank of Commerce, New Orleans filed a motion on August 8, 1975 opposing the sale, Hendrix having filed a similar motion on August 7, 1975 and have previously requested to sell the goods in the ordinary course of business under the previously granted authority as Debtor in Possession, in order to obtain the best price.

The Fifth Circuit in its opinion on page 169 (5a) alleged that Hendrix sued "to have the attempted sheriff's sale and underlying state court order declared void." However this is not the essense of the prayer of Hendrix. The essense was a declaratory judgment concerning the lack of jurisdiction of the State to affect those goods in question and as a consequence Hendrix prayed for a declaration that such acts without power or jurisdiction be declared void.

The District court below held that the state court had jurisdiction to seize the goods in question, yet the Fifth Circuit seemingly held on page 170 (6a-7a) that Hendrix had such control over the goods "Seized" to surrender them to the Bankruptcy Court. This portion of the opinion is confusing to say the least. If the state court has jurisdiction, then the action by the bankruptcy court was void. In fact by letter to the Hon. E. H. Patton, Jr., the bankruptcy judge, dated October 13, 1977, the attorney for Schroeder, says:

> "In the enclosed decision, the Fifth Circuit rejected an appeal by Hendrix that ruling [Judge Garza's holding that state had jurisdiction.], holding the matter is moot. This action thus leaves undisturbed Judge Garza's ruling that the state court garishments and seizures are valid and had the effect of placing the goods in *custodia legis* of the state court." Judge Garza held the General Agreement of Tariff and Trade to be "ficticious" and the Tariff Act of 1930 to be "antiquated". This was not reported in the 373 F. Supp. 1283.

Hendrix sought and still seeks a ruling that the state court had no jurisdiction. The alleged compromise agreement could not confer any consent jurisdiction since as pointed out below, it is contra to applicable Louisiana law, and was done without authority.

Justice Holmes in *McDonald v. Mabee* (1917) 243 U.S. 90, summed up jurisdiction well, "The foundation of jurisdiction is physical power . . . ." The Sheriff had then to have the goods so within his power to confer jurisdiction to the state court that he could touch or remove them. (See 70 Am Jr 2d 155, *Odiorne v. Colley*, 2 NH 66) Yet customs regulations and the tariff act prohibited that and indeed prohibited entry of the goods into the United States. Even more persuasive an argument as to the state court lack of jurisdiction is the Texas case of *Galveston, H & S A Ry Co. v. Terrazas* (Tex. Civil App. 1914) 171 S. W. 303, which is on point, held no jurisdiction as to the Texas courts over such merchandise and which under *ERIE* all federal courts are bound to follow.

The opinion in the district court is in direct conflict with *Galveston* and cannot be allowed to stand.

The judgment of the State court has certain consequences according to the Bankruptcy Court which on October 13, 1977 held that the action of the state court being valid, Schroeder Bank had secured creditor status based on the garishment concept, even though Schroeder had no valid claim to security or lien under an alleged UCC agreement which was invalid under Texas law. Clearly then the State court jurisdictional question still has an effect on Hendrix which is now

forced to appeal the ruling of the bankruptcy court. Such mootness, alas leads to great judicial economy.

Hendrix sought declaratory relief concerning unlawful seizure, the Fifth Circuit was told in oral argument to provide a base for a possible damage suit against Schroeder and to rate the creditors. To declare this case moot the Fifth Circuit must have held that judgment, if rendered, would neither have direct or collateral effect on plaintiff (Hendrix), Hendrix would not be able to obtain further relief based on judgment under 28 USC 2202, and no other relief is sought in the action. (See: *Danzy v. Johnson*, 1976 DC Pa., 417 F. Supp. 426.)

This action is a collateral attack on an allegedly invalid state court action and should not be declared moot.

As a consequence of all legal actions, particularly seizures, certain costs are incurred. The costs in this case for storage, etc. are in excess of $100,000.00. With various attorney's fees taxed as costs the claims are easily twice that amount. Many of these claims have been held by the bankruptcy court to be secured and payable out of the estate of Hendrix, whereas if the state court had no jurisdiction, then these costs would be taxed as costs to Schroeder and payable out of its bond for wrongful seizure.

On page 170 (8a) of the decision the Fifth Circuit held:

> "The issues still alive in this case — disposition of the proceeds, amount of the debt still

owed, and the propriety of the prejudgment seizure — will be resolved by the Bankruptcy Judge in the first instance."

Well as Hendrix predicted, the bankruptcy court felt bound by the ruling of the District Court so out of the judicial mill came a curious decision. The bankruptcy court held that Schroeder had no initial lien or security when it commenced the state court action, therefore it would appear that this was a state court attachment of goods intransit in international commerce, however even though Schroeder had no authority to seize the goods that it did, nevertheless having thereby obtaining a judgment and garnishment, Schroeder then obtained security and all the costs incurred as a result of Schroeder's seizure were secured. As a result the assets of Hendrix have been divided between Schroeder and the persons storing the goods.

If however this court were to hold that the State court had no jurisdiction then the following would result:

1. The security given Schroeder by the bankruptcy court would fall.

2. Schroeder would then be liable for all costs of storage.

3. Schroeder would be liable to Hendrix and Hendrix's other creditor's for damages, which would result in all innocent creditors receiving their money.

The Fifth Circuit relied on your recent study in "sidestepping" (416 U.S. 350, 40 L. Ed. 2d 188), otherwise known as *DeFunis v. Odegaard*, 1974, 414 U.S. 312, 94 S. Ct. 1704, 40 L. Ed. 2d 164 as dismissing the case as "moot". This court is well aware of the outcries concerning that decision.

Hendrix true is no longer in the active business of handling bonded merchandise, but only because of the actions of Schroeder. Thus a return to the old horror story of wrongful death actions, if the tort feasor killed the victim, then he was safe from legal action, what the Fifth Circuit holding in effect says, is that since Schroeder "killed" Hendrix, then Hendrix has no cause of action, since it cannot likely be "killed" again. Hendrix, gentlemen, is wounded but not dead. The Fifth Circuit tried to bury Hendrix, after kicking it a couple of times, but here is Hendrix kicking up a fuss about the whole mess. Hendrix still is in existence, its federal licenses have not been revoked, and should it prevail here it could commence active business again.

Since Judge Garza's opinion in the original district court case is reported as *J. Henry Schroeder Banking Corporation v. Schultz* (1974) 373 F. Supp. 1283, and has been indexed in various legal reference sets the problem is "capable of repetition, yet evading review." [See *Moore v. Ogilvie* (1969) 384 U.S. 814, 23 L. Ed. 2d 1, 89 S. Ct. 1493] Either Hendrix or another similar person may be subjected to the same type of "seizure" in state courts.

Furthermore, since the sale of the goods occurred after this appeal was filed, and was merely to reduce

the damages to the goods, then the appeal was not mooted by the sale. Also we have a question of rather large group of appeals costs which according to the judgment of the Fifth Circuit are to be taxed against Hendrix, which is a penalty and which destroys any notion of "mootness" since the allocating of costs against the plaintiff serves to violate due process by chilling the right to seek legal redress of wrongs and depriving the plaintiff of property without a hearing, for the concept of "mootness" is based on lack of jurisdiction of the courts, and if the court cannot decide the case then the court has no jurisdiction to decide any part of it, including the allocation of costs.

Unconstitutionality Of The Sequestration

> According to the most recent holdings of the Supreme Court of the United States, a prejudgment seizure of chattels without the intervention of a judge and showing a valid basis of the seizure order is unconstitutional.

You have held that State prejudgment replevin provisions work a deprivation of property without due process of law under the 14th Amendment when they deny the right to prior opportunity to be heard before the chattels are taken.[2] And garishment without participation of a judge and without notice or opportunity for an early hearing has also been struck down.[3]

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2 *Fuentes v. Shevin* (1972) 407 U.S. 67, 32 L. Ed. 2d 556, 92 S Ct 1983.

3 *North Georgia Finishing, Inc. v. Di-Chem, Inc.* (1975) 419 U.S. 601, 42 L. Ed. 2d 751, 95 S. Ct. 719.

Taken together the actions in state court clearly violate the standards for due process and would be void even if no other basis existed for attack.

The Fifth Circuit was urged to ignore the argument that the seizure complained of was invalid on constitutional grounds because this issue was not raised below.

During the pendency of this appeal the same court below, in fact the same judge, who sustained the sequestration of goods in question, declared that sequestrations in Texas under applicable Texas law denied due process of law in violation of the 14th Amendment. Judge Garza declared Tex. Civ. St. Art 6840 and Texas Rules of Civil Procedure, rules 696-716 unconstitutional in *Garcia v. Krausse*, (S.D. Texas, Aug. 23, 1974) 380 F. Supp. 1254. Texas enacted a valid statute which became effective in Sept. 1975. *Garcia* was subsequently remanded to the District Court on procedural grounds, but it is a class action and Hendrix is a member of the protected class.

Lack of State Jurisdiction — Federal Law

> The laws of the United States prohibit a state court from exercising jurisdiction over chattels in foreign commerce and not "in" the state, and since goods in foreign commerce are not in the United States, neither can a District Court of the United States exercise jurisdiction "in rem" over them.

Article I, Section 8, Clauses 3 & 4 of the Constitution of the United States provides:

> The Congress shall have the power
>
> 3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.
>
> 4. To define and punish piracies and felonies committed on the high seas and offenses against the laws of nations.

The general rules for jurisdiction are found in the RESTATEMENT, SECOND, CONFLICT OF LAWS and as to Judicial Jurisdiction over Chattels, sec. 60 provides:

> A State has power to exercise judicial jurisdiction to affect interests in a chattel in the state, which is not in the course of transit in interstate or foreign commerce.

25 CJS 211 also provides the rule for a case such as is at hand to the effect that warehousing goods under statutory provisions is to place them in possession of the United States; and no lien thereon can be obtained by an execution creditor. This court also stated the principle in somewhat different fashion in *Harris v. Dennie*, (1830) 8 U.S. 422, at 426; 3 Peters 292, 304:

> "Goods imported and not entered are in custody of the United States and cannot be attached upon State process. The United States having a lien on the goods for the payment of

> the duties accruing thereon and being entitled to a virtual custody of them from the time of their arrival in port until the duties are paid or secured, any attachment by a state officer in an interference with such lien and right of custody and, being repugnant to the laws of the United States, is void."

19 C.F.R. 19.6c, note 11 also provides that:

> "Imported goods in bonded warehouses are exempt from taxation or judicial processes of any State or subdivision thereof . . ."

There has been no dispute of the facts that the goods in this case were in bond in the custody of Customs, could not have been entered into the U.S., originated in Europe and were destined for Mexico. These goods were clearly in foreign commerce.

The leading Texas case on the subject, *Galveston H. & S. A. R. Co. v. Terrazas*, (Tex. Civ. App. 1914) 171 S. W. 303 which is binding on Federal courts under the *Erie* doctrine, held that Texas State courts have no jurisdiction over goods in the state under Customs bond.

The District Court seemed to think it had "in rem" jurisdiction under 28 USC 2463, but that section provides for jurisdiction only in the cases of Fines, Penalties and Forfeitures.

The Attorney General in 19 Op. Atty. Gen. 101 held that in a case wherein the U.S. Marshal of the District

Court for the Southern District of New York, attempted to attach goods in bond in accord with a court order that:

> "Imported merchandise, while in the custody of the customs officers, is not subject to attachment at the suit of private parties; and those officers should pay no attention to process of that kind against such merchandise when served on them."

The Fifth Circuit properly held in their opinion on page 170 (7a) that Hendrix had custody and possession of the goods so as to surrender them to the Bankruptcy Court for protection and preservation under the Chapter XI arrangement wherein Hendrix was appointed by Court Order dated August 16, 1974, Debtor in Possession and Trustee with full powers and placed them in possession of all its assets where ever located. This Order has never been appealed or revoked.

Lack of State Jurisdiction — International Law

> No judicial officer may seize goods "in transit" under international law, since adequate remedy can be had in the courts of the domicile of the shipper and the consignee and such an act of seizure is a type of piracy.

The concept of free movement of goods in international commerce through other nations is old perhaps having its origin in the times or pre-history when traders made their way from kingdom to kingdom. Most states then did not border on the sea and therefore overland trade was essential. Even today

many nations would be subject to starvation by their neighbors if it were not for International Law doctrines of "Freedom of Transit" or "Right of Passage".

Modern international law is based in good part on Roman or Civil law and all Civil law jurisdictions including Louisiana have a legal servitude on property of the right of passage or way. Barry Nichols in *An introduction to Roman Law* (Oxford) at page 148 states that the English Law of Easements particularly the fundamental work by C. J. Gale (1839) is taken almost in toto from Roman law and from Lord Bracton's borrowings from the Roman law.

This law developed into International Law by custom, which Kelsen[4] tells us is just as valid as legislation. Kelsen[5] also advises that the principles of Grotius, Puffendorf and Vattel also became binding by custom on nations. Article 38 of the Statute of the International Court of Justice also provides that the Court shall apply such custom as did the same Article provide for like application by the Permanent Court of International Justice previously.

In the case of *The S. S. Wimbledon* (1923) P.C.I.J., Ser. A, No. 1; 1 Hudson, World Court Reports 168, it was held that Germany could not refuse free access to the Kiel Canal, to that ship even though Germany was neutral and the ship was English under French charter, carrying 4,200 tons of munitions for Poland. This

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4 Kelsen, Hans, *Principles of International Law*, 2d Ed., ed. by Robert W. Tucker, Holt, Rinehart & Winston, p. 441.

5 Op. cit., p. 443.

is the leading case on the right of passage, which is an international servitude.

Vattel in Book II, Chapt. IX, sec. 127-Book II, Chap. X, sec. 134 discusses the existence of that right, also in regards to the right of passage of merchandise (sec. 134). Vattel's *Law of Nations,* is of course the classic work on the subject and in sec. 132 he cites the case of the Count of Lupfen, who was condemned by Emperor Sigismund to pay damages for having stopped goods going through Alsace. It was held that roads are free to all men rich and poor.

Puffendorf in his *Law of Nations,* covers the same subject in Book 3, ch. 3, s. 6, p. 29.

The modern law on the subject is codified in the General Agreement on Tariffs and Trade (GATT), 61 Stat pts 5 & 6 at A3, TIAS 1700, 4 Bevans 639, 55-61 UNTS, particularly Article V which concerns Freedom of Transit. The parts applicable to this case are paragraphs 1, 2, and 3, particularly paragraph 2. They read as follows:

ARTICLE V
Freedom of Transit

1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without transshipment, warehousing, breaking bulk, or change in mode of transport, is only a portion

of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this Article "traffic in transit".

2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

3. Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.

GATT is an executive agreement, made pursuant to Congressional authority but is nevertheless binding

as a treaty. A lengthy discussion of GATT as domestic law is available in either Professor Jackson's law review article[6] or his book.[7] I will assume that it is valid for if this court would hold that the President cannot obligate the United States in such a manner this case would be in quite a turmoil since both Texas and Hawaii were annexed using the same procedure or one quite similar and thus Texas would then be perhaps still an independent state and this Court would have no jurisdiction as would also be the case with the District Court of Texas.

GATT permits only reasonable delays except in cases of failure to comply with applicable customs laws and regulations, and certainly not seizures. Even in admiralty law it is fundamental that a ship may, but the cargo may not be seized.

There are no cases on Article V of GATT, perhaps due to the fact that the rest of the world assumes that the freedom of transit being such an old and established doctrine, the freedom of transit is absolute.

The district court seemed to concern itself with a practical matter of enforcement of payment of a debt. Hendrix has never denied that it owed Schroeder some money. The amount owed is disputed and the manner of attempted collection is alleged to be illegal under the legal doctrines previously cited. If A owes B an amount of money, A can sue B or A can subvert the law

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6 Jackson, John H., *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 Mich. L. R. 249 (1967).

7 Jackson, John H., *World Trade and the Law of GATT*, Bobbs-Merrill, New York, 1969.

by sending over a collector to take goods from B, do or threaten B harm. The latter means of collection are far more effective than the legal methods of course, but they are illegal.

It is obvious that Schroeder Bank had several options open:

1.) It could have sued Hendrix in state or federal court and seized bank accounts.

2.) It could have brought suit in Mexico demanding payment from the consignees.

3.) It could have sued in state in state or federal court and asked for a recognition of its alleged lien and an injunction to prevent Hendrix from wasting assets.

4.) Or it could have filed a petition for involuntary bankruptcy if Hendrix were insolvent.

But Schroeder decided to use strong arm tactics and attempt to seize the goods, and they are therefore liable to Hendrix for damages for wrongful seizure. In addition since the Sheriff seized without any authority he has taken goods from international commerce which is piracy.

CONCLUSION

Certiorari should be granted to prevent this piracy which has been sanctioned by the courts of the United States, from going unpunished and to permit it to become precedent. For if you fail to do so, then "freedom of transit" will become meaningless and any vessel or aircraft or motor carrier would be liable to seizure or hijacking by any judicial officer, if some lien were alleged on chattels carried. Similarly any country could seize goods of a United States citizen using the District Court case as authority, since it holds that freedom of transit is meaningless. The issue does not only affect Hendrix, it affects all goods in interstate or international trade.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing petition were sent to the following counsel by U.S. Mail on the ____ day of March, 1978:

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Glenn L. Morgan

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-2586

D. C. Docket No. CA 73-B-127 & 128

J. HENRY SCHROEDER BANKING CORP.,
Plaintiff-Appellee,

versus

W. Michael BLUMENTHAL, Secretary of the Treasury
of the United States, et al.,
Defendants-Appellees-Cross-Appellants.

BEN R. HENDRIX TRADING CO., INC.,
Plaintiff-Appellant-Cross-Appellee,

versus

J. HENRY SCHROEDER BANKING CORP. et al.,
Defendants-Appellees.

Appeals from the United States District Court for the
Southern District of Texas

Before BROWN, Chief Judge, HILL and FAY, Circuit
Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, remanded to the said District Court with instructions in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellant cross-appellee pay to plaintiff-appellee, defendants-appellees cross-appellants and defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

October 11, 1977

Issued as Mandate: NOV. 2, 1977

Re-Issued as Mandate:

J. HENRY SCHROEDER BANKING CORP.,
Plaintiff-Appellee,

versus

W. Michael BLUMENTHAL, Secretary of the Treasury of the United States, et al.,
Defendants-Appellees-Cross-Appellants.

BEN R. HENDRIX TRADING CO., INC.,
Plaintiff-Appellant-Cross-Appellee,

versus

J. HENRY SCHROEDER BANKING CORP. et al.,
Defendants-Appellees.

No. 74-2586.

United States Court of Appeals,
Fifth Circuit.

Oct. 11, 1977.

Appeals from the United States District Court for the Southern District of Texas.

Before BROWN, Chief Judge, HILL and FAY, Circuit Judges.

JOHN R. BROWN, Chief Judge:

This lawsuit involves goods, principally liquor, in Customs' bond which were seized from the bonded

warehouses in two Texas counties. Due to the voluntary filing of an arrangement under Chapter XI of the Bankruptcy Act, followed by a judicial sale to which all parties consented, we hold that the issue of an earlier-challenged seizure of the liquor is now moot.

Simon Says "No"

This dispute arose from a claim by the Henry J. Schroeder Banking Corporation (Schroeder), against Ben R. Hendrix Trading Co., Inc. (Hendrix), an import/export dealer. Since 1968 Schroeder had made loans to Hendrix to finance his inventory. The loans were secured by a lien on the assets. In 1973 when Hendrix was behind on the payment of a loan, Schroeder filed for foreclosure of the lien and a money judgment for the outstanding loan. The state court ordered sequestration of all the assets located either in Hendrix's own warehouse or in the warehouse under Customs' bond.

Subsequently a now controversial compromise agreement was entered into by Schroeder and Hendrix.[1] Under the agreement Hendrix admitted the amount of the debt and agreed to a judgment being entered against him. A sale of the assets was arranged by Schroeder. Hendrix, however, could sell the goods if he could find a buyer willing to pay more than Schroeder's buyer. An option clause gave Schroeder the right to sell the goods if Hendrix attempted to

1 Hendrix claims that he was not bound by the compromise agreement since the person who signed it was not an authorized agent capable of binding the company. That issue, although not resolved earlier, is now also moot.

otherwise dispose of the property. Contending that Hendrix did just that, Schroeder obtained orders for a public sale of the liquor by the sheriff. Customs, speaking through Secretary of the Treasury, William Simon, objected and asked for reformed orders of sale. Although two sheriff's sales were attempted, Customs refused to release the goods either to the sheriff or to Hendrix. This federal suit ensued.

Federal Prohibition Revisited

Two lawsuits were filed by the parties in federal court on the same day. Both sought declaratory judgments. Hendrix sued Schroeder, the Customs officials, and the Secretary of the Treasury, seeking to have the attempted sheriff's sale and the underlying state court order declared void.[2] Schroeder sued Hendrix and essentially the same other officials contending that the attempted seizure and sale were not in violation of federal law. Schroeder also sought mandamus to compel Customs to release the liquor and an injunction to prevent Hendrix from taking the goods from the warehouses. Customs counterclaimed by filing a bill in the nature of an interpleader, asking that if the federal court entertained the case, they be released from liability upon compliance with either the

2 Hendrix contended that 19 CFR 19.6(c), note 11, which provides that:

> Imported goods in bonded warehouses are exempt from taxation or judicial process of any State or subdivision thereof,

and the General Agreement on Tariffs and Trade (GATT), prevent a state court from ordering a sale of goods under Customs' bond pursuant to an *in personam* foreclosure suit on a secured note covering the warehoused goods.

state or federal process, as found appropriate by the federal court.

The Federal District Court held that the state court could adjudicate the ownership of the goods in question. The Court held that while the state court could direct compliance with Customs' regulations to effect a transfer of the title documents in question, its attempt to do so was void due to its failure to include the warehousemen in its order. The case was dismissed without prejudice to further pursue these matters in the state court or under Customs' laws and regulations. A supplemental order issued by the District Court held that Customs would be discharged from further liability upon compliance with properly executed warehouse receipts, whether done voluntarily or in response to orders of the state court.

Mootness In The Moonshine

Hendrix appealed from these orders, but after the instant appeal was filed Hendrix filed a Bankruptcy Chapter XI reorganization proceeding to work out an arrangement whereby control of the assets was maintained by him as a debtor in possession. During the course of the Chapter XI proceedings, all parties moved to sell the liquor. Hendrix sought privately to sell it as a debtor in possession and the creditors sought to have a trustee handle the transaction. The Bankruptcy Judge appointed a trustee who sold the merchandise and now holds the proceeds subject to the orders of the Bankruptcy Court. The appropriate

Customs and title documents were executed, Customs officials acted in accordance with these instruments, and the goods which were the subject of the controversy were delivered to the buyers.

Both Customs officials and Hendrix recognized that the Bankruptcy Court had power to order such a sale. Indeed, as debtor, Hendrix had enough power and control over the goods to surrender them to the Bankruptcy Court. Thereafter the goods were not subject to any restraint by state officials and were subject only to payment or security for Customs' duties. Hendrix owns no other merchandise or liquor under Customs' bond and is no longer actively involved in importing and exporting bonded merchandise.

The controversy that gave rise to the actions for declaratory judgments by both Hendrix and Schroeder was whether control of the liquor would be with Hendrix or with the state court officers and those who purchased it at the aborted judicial sales. Since the liquor has now been sold in an admittedly valid manner and is in the hands of third parties, none of the parties to the controversy below can be said to have any right of control over the goods. Thus, there is no longer any case or controversy. Hendrix owns no other merchandise in bond and is no longer in the business of importing and exporting bonded merchandise, so there is no likelihood that a similar controversy might arise in the future.

The Supreme Court established the starting point for determining mootness in *DeFunis v. Odegaard*, 1974, 416 U.S. 312, 316, 94 S.Ct. 1704, 1705-06, 40 L.Ed.2d

164, 168-69. There, it said, the criterion for determining mootness "is the familiar proposition that 'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.' " (Cites omitted).

This Court has before it Hendrix, Schroeder, and various Customs officials. Since the Customs' regulations have been met and Customs has agreed to the sale there is no decision that we could now reach on the issue before us that could affect Customs. Although Hendrix and Schroeder still have some interest in the Bankruptcy Court's disposition of the proceeds from the sale, there is no longer any live dispute between them over who has the right to possession and control of the inventory since by their consensual actions they both impliedly now agree that unquestionably the third party who purchased it at the sale is the only one with such a right. The issues still alive in this case — disposition of the proceeds, amount of the debt still owed, and the propriety of the prejudgment seizure — will be resolved by the Bankruptcy Judge in the first instance. It would be premature for this Court to dispose of those issues here.

Under the authority of prior Fifth Circuit decisions, this case has become moot due to the admittedly valid sale of the assets by the Bankruptcy Court in a proceeding voluntarily initiated by Hendrix, a sale to which all parties involved in the appeal consented. *Southern Bell Tel. & Tel. Co. v. United States*, 5 Cir., 1976, 541 F.2d 1151; *Barron v. Bellairs*, 5 Cir., 1974, 496 F.2d 1187; *National Lawyers Guild v. Board of Regents*, 5 Cir., 1974, 490 F.2d 97; *Merkey v. Board of*

Regents, 5 Cir., 1974, 493 F.2d 790; *United States Servicemen's Fund v. Killeen Independent School District*, 5 Cir., 1974, 489 F.2d 693; *Gooden v. Mississippi State University*, 5 Cir., 1974, 499 F.2d 441. The case is therefore remanded to the District Court with instructions to dismiss it as moot under our uniform precedents.

REMANDED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

December 13, 1977

TO ALL PARTIES LISTED BELOW:

NO. 74-2586 — J. Henry Schroeder Banking Corp., -vs-
W. Michael Blumenthal, Secretary, etc., et al;
Ben R. Hendrix Trading Co., Inc. -vs- J. Henry
Schroeder Banking Corp., et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk
/s/ R. ADELINE BARNES
Deputy Clerk

Mr. Benjamin S. Hardy
Mrs. Ben R. Hendrix
Mr. Glenn L. Morgan
Mr. Charles C. Murray
Mr. James R. Clopton
Mr. Ralph L. Alexander
Mr. William L. Bowers, Jr.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

December 23, 1977

Mr. Glenn L. Morgan
Attorney
P.O. Drawer 51478
511 Esplanade
New Orleans, LA 70151

No. 74-2586 — J. Henry Schroeder Banking Corp. v. W. Michael Blumenthal, etc., ET AL. * * * * * Ben R. Hendrix v. J. Henry Schroeder

MANDATE STAYED TO AND
INCLUDING January 22, 1978

Dear Counsel:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38 LW 3502).

A copy of the opinion, judgment and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk
/s/ SUSAN M. GRAVOIS
Deputy Clerk

enc.

cc: Mr. Benjamin S. Hardy
Mrs. Ben R. Hendrix